

# Judicial Review of the EU's Common Foreign and Security Policy: Lessons from the Rosneft case

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Peter van Elsuwege Do 6 Apr 2017

On 28 March 2017, the [Grand Chamber](#) of the EU Court of Justice (CJEU) decided in a preliminary ruling that the restrictive measures adopted by the Council against Russian undertakings, including oil company *Rosneft*, are valid. The judgment is of constitutional significance. It clarifies the scope of the CJEU's jurisdiction with respect to acts adopted in the sphere of the EU's Common Foreign and Security Policy (CFSP). In particular, it reveals that the EU system of judicial protection fully applies in relation to restrictive measures against natural and legal persons (so-called 'targeted sanctions').

## 'Carve-out' and 'claw-back': understanding the role of the CJEU in the sphere of CFSP

Pursuant to the second subparagraph of Article 24 (1) TEU and the first paragraph of Article 275 TFEU, the CJEU cannot, in principle, adjudicate with respect to acts adopted in the context of the CFSP. As observed in the insightful opinion of Advocate General [Wathelet](#), this is a so-called 'carve-out' derogating from the general jurisdiction which Article 19 TEU confers on the CJEU to ensure that in the interpretation and application of the Treaties the law is observed. However, the last sentence of the second subparagraph of Article 24 (1) TEU and the second subparagraph of Article 275 TFEU include an 'exception to the exception' in the sense that the CJEU is competent to monitor compliance with Article 40 TEU and to review the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of the CFSP provisions in the TEU. This 'claw-back' provision, in combination with the full integration of the CFSP in the EU legal order, implies that the Lisbon Treaty has given the CJEU significant powers in the field of CFSP.

The crucial question to be addressed in the *Rosneft* case was whether these powers also include the possibility to give a preliminary ruling on the validity of an act adopted on the basis of a CFSP provision, more precisely [Decision 2014/512](#) concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine. This Decision, adopted under Article 29 TEU, is implemented in the EU legal order by virtue of [Regulation 833/2014](#). The latter is based upon Article 215 TFEU and, accordingly, squarely falls within the Court's jurisdiction. Recalling its famous *Kadi* judgment, the CJEU leaves no doubt that it must ensure the, in principle full, review of the legality of all acts adopted on the basis of the TFEU (para 106). Significantly, the Estonian and Polish governments and the Council argued that the Court did not need to decide on its jurisdiction in CFSP matters since it could simply interpret the Regulation which had been adopted under the TFEU. The CJEU rejected this suggestion because the potential invalidity of Regulation 833/2014 would have no effect on the Member States' obligations to ensure that their national policies are in line with the EU's position adopted under Decision 2014/512 (para 56). In other words, the special rules and procedures applicable in relation to the CFSP do not affect the conclusion that the Member States are legally bound to observe CFSP decisions. Hence, the question whether or not the validity of these decisions can be subject to a preliminary ruling procedure is of fundamental importance to ensure the uniform interpretation and application of EU law in the context of the CFSP.

The CJEU's jurisdiction to monitor the compliance of CFSP decisions with Article 40 TEU on the basis of a preliminary ruling is rather uncontroversial. Because the Treaties do not specify how this judicial monitoring is to be carried out, the general jurisdiction that Article 19 TEU confers on the Court is applicable (para. 62). The situation is more complicated as far as the judicial review of restrictive measures against natural and legal persons is

concerned. Article 24 (1) TEU empowers the CJEU to review the legality of certain decisions as provided for by the second paragraph of Article 275 TFEU. The latter states that the Court has jurisdiction to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 TFEU, concerning that review of legality. A literal interpretation of these provisions may lead to the conclusion that a direct action for annulment brought before the General Court is the only option for reviewing the legality of targeted sanctions. The Court firmly rejects such an understanding of the 'claw-back provisions': the reference in Article 24 (1) TEU to the second paragraph of Article 275 TFEU does not concern the type of procedure (i.e. actions for annulment) but rather the type of decision (i.e. 'restrictive measures') whose legality may be reviewed (para. 70).

## **A complete system of legal remedies to review the legality of sanctions against natural or legal persons**

The Court's broad interpretation of the claw-back provisions implies that the system for judicial protection in the EU fully applies with respect to the adoption of targeted sanctions. As can be derived from Article 19 TEU, this system is based on two pillars including the CJEU and the national courts or tribunals of the Member States. To ensure the uniform application of EU law within the EU legal order, national courts or tribunals have no jurisdiction to declare the invalidity of EU acts themselves but are bound to issue a reference for a preliminary ruling of the CJEU to review the legality of the contested decisions. The application of this so-called *Foto-Frost* logic in relation to the judicial review of sanctions against natural or legal persons is certainly one of the main lessons to be drawn from the *Rosneft* case.

Accordingly, the *Rosneft* decision puts the limits to the CJEU's jurisdiction in relation to the CFSP in perspective. As far as the judicial review of restrictive measures against natural or legal persons is concerned, the coherence of the EU system of judicial protection is preserved and there is no difference in comparison to other areas of EU law. Only measures of general application, such as the basic principle to effect a partial interruption of the EU's economic and financial relations with Russia, are excluded from judicial review. However, as soon as the persons and entities targeted by the sanctions are defined, the EU system of judicial protection applies to its full extent.

## **EU values and constitutional principles also apply with respect to the CFSP**

The *Rosneft* judgment confirms that the CFSP is an integral part of the EU legal order and, as a result, the EU's horizontal principles such as respect for the rule of law and the right to effective judicial protection apply to this specific area of EU law. This can be derived from the combined reading of Article 2 TEU (defining the EU's foundational values as part of the 'common provisions of the EU Treaty') and Articles 21 and 23 TEU (para. 72). The link between the latter two articles is important. Article 21 TEU belongs to the 'general provisions on the Union's external action' and refers to the EU's values whereas Article 23 TEU is subject to 'the specific provisions on the CFSP'. Yet, Article 23 TEU expressly provides that the Union's action in relation to the CFSP 'shall be guided by the principles, shall pursue the objectives of, and be conducted in accordance with, the general provisions [on the Union's external action]'. In other words, the EU Treaty provisions relating to the CFSP – including the part on the limits to the Court's jurisdiction – cannot be interpreted in isolation from the general structure and logic of the Treaties.

This explains why the Court also expressly refers to Article 47 of the EU Charter of Fundamental Rights concerning the right to effective judicial protection as an essential component of the rule of law. Whereas the Charter cannot confer jurisdiction to the Court where this is excluded under the Treaties, its Article 47 implies that this exclusion should be interpreted strictly (para. 74). Accordingly, the *Rosneft* judgment continues a trend in the case law of the CJEU where respect for the rule of law and fundamental rights of individuals is balanced with respect for the special nature of foreign affairs in the EU legal order (see, in particular, also [Case C-455/14P](#), *H. v. Council of the European Union*).

## Respecting the discretionary powers of the Council

Finally, the *Rosneft* judgment contributes to the expanding case law regarding the EU's sanctions policy. The Court carefully analysed the long list of arguments put forward by *Rosneft* regarding the alleged incompliance of the restrictive measures with, *inter alia*, Article 40 TEU, the Partnership and Cooperation Agreement (PCA), the obligation to state reasons, the principle of proportionality, the freedom to conduct business and the right to property. In essence, the CJEU rejected all these claims with a reference to the Council's broad discretionary powers in relation to issues of foreign and security policy. This implies, amongst others, that the Council can describe in detail the persons and entities that are to be subject to the restrictive measures in a CFSP decision without encroaching on the procedure for the implementation of this decision under Article 215 TFEU (paras 88-90). Significantly, the level of detail of the CFSP decision does not affect its qualification as a 'non-legislative act'. In the Court's view, 'the exclusion of the right to adopt legislative acts in the area of the CFSP reflects the intention that that policy should be subject to specific rules and procedures' (para. 91). In other words, the distinction between 'legislative' and 'non-legislative' acts is a purely procedural issue.

The CJEU also confirms that the sanctions against Russian entities in relation to the crisis in Ukraine can lawfully be adopted for the protection of essential EU security interests and for the maintenance of international peace and international security. The Council enjoys a broad discretion with respect to this safeguard clause included in Article 99 of the PCA (para. 116). The objective of maintaining peace and security further justifies the negative consequences for individual operators such as Rosneft (para. 150). Last but not least, it is noteworthy that the Court's judgment is not limited to questions of validity but also concerns issues of interpretation. For instance, the CJEU clarified that the sanctions do not relate to the processing of payments by banks (para 184).

Hence, the Court's preliminary ruling in *Rosneft* is important in many respects. It upholds the coherence of the EU system of judicial protection as far as the adoption of targeted sanctions is concerned and brings further legal clarity about the validity and interpretation of those sanctions.

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